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UNITED STATES SUPREME COURT

OCTOBER, 1994

MURLEY HERNANDEZ LEBLANC, ET AL

VERSUS

LUIS MEZA, M.D., ET AL

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL, THIRD CIRCUIT
OF THE STATE OF LOUISIANA

ON DENIAL OF CERTIORARI BY
THE SUPREME COURT OF
THE STATE OF LOUISIANA

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10 PP

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER LOUISIANA VIOLATES DUE PROCESS REQUIREMENTS BY APPLYING A SPECIAL MEDICAL MALPRACTICE STATUTE OF LIMITATIONS THAT EXTINGUISHES WITHOUT NOTICE THE CAUSES OF ACTION OF VICTIMS WHO NEITHER KNEW - NOR SHOULD HAVE KNOWN - OF THEIR INJURIES, BECAUSE (1) STATE LAW GRANTS THOSE PERSONS VESTED PROPERTY RIGHTS IN A CAUSE OF ACTION FROM THE MOMENT THE WRONGFUL ACT OCCURS, AND (2) IT IS CONSTITUTIONALLY IMPROPER TO SANCTION OR PENALIZE MERE PASSIVE FAILURE TO ACT BY ONE WHO NEITHER KNOWS (NOR SHOULD KNOW) OF A DUTY TO ACT.

II. WHETHER LOUISIANA'S MEDICAL MALPRACTICE STATUTE OF LIMITATIONS VIOLATES EQUAL PROTECTION BY DISCRIMINATING ARBITRARILY AND IRRATIONALLY BETWEEN VICTIMS OF MEDICAL MALPRACTICE BASED UPON WHEN THEY DISCOVER THEIR INJURY, GRANTING THE BENEFIT OF A "DISCOVERY RULE" TO CERTAIN VICTIMS, WHILE ARBITRARILY DENYING IT TO OTHERS.

LIST OF ALL PARTIES

PLAINTIFFS:

MURLEY HERNANDEZ LEBLANC
RAYNE, LOUISIANA

DON L. LEBLANC
RAYNE, LOUISIANA

DEFENDANTS:

OUR LADY OF LOURDES REGIONAL MEDICAL CENTER, INC.
LAFAYETTE, LOUISIANA

DR. LUIS MEZA
LAFAYETTE, LOUISIANA

DR. GEORGE R. SMITH
LAFAYETTE, LOUISIANA

DR. RONALD J. RITCHEY
LAFAYETTE, LOUISIANA

STATE OF LOUISIANA
HONORABLE RICHARD P. IEYOUB
OFFICE OF THE ATTORNEY GENERAL
BATON ROUGE, LOUISIANA

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REPORTS OF DECISIONS BELOW

The decision of the Court of Appeal for the Third Circuit, State of Louisiana, is reported below as In re Murley Hernandez LeBlanc and Don L. LeBlanc, Plaintiffs-Appellants, v. Luis Meza, M.D., George Smith, M.D., Ronald Ritchey, M.D., Our Lady of Lourdes Regional Medical Center, and Richard P. Ieyoub, Attorney General of the State of Louisiana, Defendants-Appellees, 620 So. 2d 521 (La. App. 3rd Cir. 1993).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Court of Appeal, Third Circuit, State of Louisiana entered the judgment sought to be reviewed on June 16, 1993. LeBlanc v. Meza, 620 So. 2d 521 (La. App. 3rd Cir, 1993). An application to the Louisiana Supreme Court for certiorari was timely filed on July 2, 1993. The

Louisiana Supreme Court denied certiorari on July 1, 1994. LeBlanc v. Meza, ____ So. 2d _____ (La. 1994).

The jurisdiction of this Honorable Court is based upon 28 U.S.C., Section 1257(a):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United

States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

La. R.S. 9:5628:

"A. No action for damages for injury or death against any physician, chiropractor, dentist, psychologist, hospital duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41(A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims

filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

B. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts."

STATEMENT OF THE CASE

This case originated as a pre-suit claim filed under Louisiana's Medical Malpractice Act[1] by the recipient of an HIV-tainted blood transfusion. The transfusion was given on March 5, 1985. The patient only learned of the HIV infection from a blood test during a routine life insurance physical examination in 1989.

The defendants filed a proceeding in the state district court seeking a declaration that the claim had been extinguished by Louisiana's special "patient care" three-year statute of limitations, La. R.S. 9:5628.[2]

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[1]La. R.S. 40:1299.41 et seq.

[2]La. R.S. 40:1299.47 specifically permits defendants to raise a defense under La. R.S. 9:5628 prior to exhausting the normal medical

The petitions filed by claimants with the Louisiana Insurance Commission alleged that La. R.S. 9:5628 violated both the equal protection and due process clauses of the U.S. Constitution, as well as Louisiana Constitutional provisions. Appendix, pages 80-83 and 95-99. The district court upheld the constitutionality of the statute (Appendix page 70) and held that all claims (with the exception of one "continuing tort" claim against Dr. Meza) had been extinguished.

The Court of Appeals for the State of Louisiana, Third Circuit, upheld the district court's decision (one judge of the three-judge panel dissenting), and petitioners applied to the Louisiana Supreme Court for a writ of certiorari,

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review panel provisions of the act.

urging that Due Process had been violated because what were vested property rights under Louisiana law were destroyed prior to notice to claimants of the existence of those rights, and that Equal Protection was violated "under even the [U.S. Supreme Court's] most deferential standard of review" because the statute made arbitrary and irrational discriminations between the persons whose actions were preserved and those whose actions were destroyed. Appendix, pages 101-107. A divided Louisiana Supreme Court denied the application, with three of seven judges voting to grant the writ, on July 1, 1994.

(The rules of the Louisiana Supreme Court do not provide for rehearings in cases of denial of writ applications. An informal practice of filing "Motions for

Reconsideration" exists, and the plaintiffs submitted a Motion for Reconsideration, limited to one state law claim against Lourdes Hospital. The Motion for Reconsideration had not been acted upon by the Louisiana Supreme Court as of the date this Petition was prepared. Because the Motion for Reconsideration does not address any federal constitutional questions, this petition for certiorari is submitted within the time limits of Rule 13(1). All questions presented by the Motion for Reconsideration in the Louisiana Supreme Court are reserved.)

ARGUMENT

In analyzing the due process and equal protection questions presented by the Louisiana Medical Malpractice Statute of Limitations, one must keep in mind that in Louisiana a tort claim is a vested property right (Fauchaux v. Alton Ochsner Medical Foundation Hospital, 470 So. 2d 878, at 878-79 [La. 1985]), which exists "from the inception of the tortious act" (Taylor v. Giddens 618 So. 2d 834, at 840 [La. 1993]).

Although Louisiana's statute of limitations for torts is one year, Louisiana generally applies the maxim contra non valentam agere nulla currit praescripto ("prescription does not run against a party unable to act") to delay the running of the statute until the injured party knows (or should know) of

the injury. See Rajnowski v. St. Patrick's Hospital, 564 So. 2d 671, at 674 (La. 1990) (holding R.S. 9:5628 "in a limited manner legislatively overruled" this discovery rule).

R.S. 9:5628 provides that any action "arising out of patient care" must be brought within one year of "the alleged act, omission, or neglect," or "within one year from the date of discovery of the alleged act, omission, or neglect", but adds that "even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect."

Due Process

Due process entitles one with a legally protected property interest to

reasonable notice of its impending loss. Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983).

La. R.S. 9:5628 violates the principle that the holder of a vested property right deserves reasonable notice before that right is destroyed. The statute imposes a three-year limit on the effect of Louisiana's traditional discovery rule, thus depriving some medical malpractice victims of reasonable notice before the loss of their cause of action. As drafted and applied, the very purpose of R.S. 9:5628 is to prevent effective notice to some victims - to insure that in many cases notice comes too late to sue.

This is not a situation in which Louisiana exercised its "[paramount]

interest in fashioning its own rules of tort law" (Martinez v. State of California, 444 U.S. 277, at 282, 100 S. Ct. 553, at 555, 62 L. Ed. 481, at 487 [1980]) to deny a remedy. The legislature did not decree that no cause of action would come into existence, or provide that after X years no cause of action could arise. Louisiana law granted this plaintiff a tort remedy. Under Louisiana law, that remedy came into existence as a vested property right at the moment of the injury. Under such circumstances, superimposing a three-year limit on Louisiana's traditional discovery rule deprives the plaintiff of property while neither observing (nor providing a reasonable substitute for) an important traditional Louisiana procedure for enforcing state prescribed limits -

it thus violates Due Process. Cf. Honda Motor Co., Ltd. v. Oberg, _____ U.S. _____, at _____; 114 S. Ct. 2331, at 2339; 129 L. Ed. 2d 336, at 348 (1994) ("traditional practice provides a touchstone for constitutional analysis").

We respectfully suggest that the Court's statement in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, at 485-486, 108 S. Ct. 1340, at 1344, 99 L. Ed. 2d 565, at 575 (1988) that a State's involvement "in the mere running of a general statute of limitation" is not "generally sufficient to implicate due process" does not control the issues raised in the present case.

Tulsa Professional Collection Services relied upon Texaco, Inc. v. Short, 454 U.S. 516, 102 S. Ct. 781, 70

L. Ed. 2d 738 (1982). Short considered the effect of a statute of limitations on persons who knew of their rights. Short merely says that "the State has the power to condition the permanent retention of [a] property right on the performance of reasonable conditions that indicate a present intention to retain the interest." 454 U.S. at 526, 102 S. Ct. at 790, 70 L. Ed. 2d at 748-749 (emphasis added). Short does not say that it is reasonable to require a person who does not know or have cause to know that he has a right to take steps to protect that unknown right. Short dealt with people who had neglected to look after their rights[3] - not those who never received

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[3] "[T]his court has never required the State to compensate the owner for the consequences of his own neglect." Short, 454 U.S. at 530, 102 S. Ct. at 792, 70 L. Ed. 2d at 751.

notice of the existence of a vested cause of action. There is no question of neglect in the present case.

Due process means that a state may not sanction a mere passive failure to act by one who does not know and who could not have reasonably been expected to know of his legal obligation to act. "Notice is [also] required in a myriad of [civil] situations where a penalty or forfeiture might be suffered for mere failure to act." Lambert v. People of the State of California, 355 U.S. 225, at 228, 78 S. Ct. 240, at 243, 2 L. Ed. 2d 228, at 231 (1957).

La. R.S. 9:5628 violates due process requirements under these standards by extinguishing without notice a vested property right when its holder neither

knew nor should have known of the right's existence.

Equal Protection

We suggest that the statute violates Equal Protection requirements as well. "[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even [the U.S. Supreme Court's] most deferential standard of review." Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71, at 83, 108 S. Ct. 1645, at 1653, 100 L. Ed. 2d 62, at 75 (1988). Even absent a suspect classification a state classification must "rationally further a legitimate state interest." Nordlinger v. Hahn, 505 U.S. _____, at _____; 112 S. Ct. 2326, at 2331-32; 120 L. Ed. 2d 1, at 12 (1992) (emphasis added).

The words "rational" and "legitimate" are both important - the classification must be rational and legitimate.

Limitations on medical malpractice actions are usually justified as a response to the "medical malpractice crisis," and an attempt to limit costs of care and insurance. Obviously these are legitimate goals. But just as obviously not every means that might rationally tend to further these goals is "legitimate".

A law mandating the dismissal of one-half of all medical malpractice claims chosen at random by lot would be "rational" if only reduction of costs were considered. But such a law would not be "legitimate" (or "rational") in the way it discriminated between those

who would recover and those who would not - it would be arbitrary, capricious and irrational. R.S. 9:5628 destroys vested property rights of only one class of holders. Because of due process notice requirements, it is ironic that the deprived class is composed of those who have not obtained notice of the existence of their vested property rights. The statute discriminates between medical malpractice victims based upon the speed with which their symptoms manifest themselves. All such victims (Louisiana law says) have vested property rights in an action from the moment of the wrongful act. Such victims (Louisiana law says) have one year from discovery to bring their suit. But (9:5628 says) those who do not receive notice of their injury within three years lose that vested

property right. This picking and choosing among claimants bases recovery upon the "luck of the draw" in receiving notice of the injury. That offends equal protection principles as well as due process. The three-year limitation itself has no rational justification in preventing "stale claims" - that is demonstrated by the fact that Louisiana does not apply it to other tort causes of action. Cf. Clark v. Jeter, 486 U.S. 456; 108 S. Ct. 1910; 100 L. Ed. 2d. 465 (1988).

CONCLUSION

The present case vividly illustrates the arbitrary operation of R.S. 9:5628. The average time from infection with HIV to the development of symptomatic AIDS is 10 to 11 years. Uncontradicted expert testimony in the record indicates that

only approximately eight percent of those infected with HIV by blood transfusions develop symptoms within three years of the transfusion date. Eleven of twelve victims like petitioner are likely to learn of their fate after the statute of limitations has run. No quid pro quo compensates for this discrimination among victims.

We request that the Court grant this petition for certiorari.

Respectfully submitted,

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The Supreme Court of
the State of Louisiana

IN RE: MURLEY HERNANDEZ LEBLANC AND DON L. LEBLANC

VS. NO. 93-C - 1838

LUIS MEZA, M.D., GEORGE SMITH, M.D. RONALD RITCHEY, M.D., OUR LADY OF LOURDES REGIONAL MEDICAL CENTER: RICHARD P. IEYOUB, ATTORNEY GENERAL OF THE STATE OF LOUISIANA

- - - - - -

IN RE: LeBlanc, Murley Hernandez; LeBlanc, Don L.; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Lafayette 15th Judicial District Court Div. "A" Number 90-5317; to the Court of Appeal, Third Circuit, Number CA92-1040

- - - - - -

July 1, 1994

Denied.

CDK

WFM

JCW

PH

CALOGERO, C.J. would grant the writ.

DENNIS, J. would grant the writ.

LEMMON, J. not on panel.

ORTIQUE, J. would grant the writ.

Supreme Court of Louisiana
July 1, 1994

_____

Clerk of Court
For the Court

Jun 16 1993

NO. 92-1040

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

IN RE: MURLEY HERNANDEZ LEBLANC
and DON L. LEBLANC

Plaintiffs - Appellants

VERSUS

LUIS MEZA, M.D., GEORGE SMITH, M.D., RONALD RITCHEY, M.D., OUR LADY OF LOURDES REGIONAL MEDICAL CENTER, and RICHARD P. IEYOUB, ATTORNEY GENERAL OF THE STATE OF LOUISIANA

Defendants - Appellees

Appeal from the Fifteenth Judicial District Court, Parish of Lafayette, State of Louisiana; Hon. G. Bradford Ware, District Judge, Presiding.

Before DOMENGEAUX, C.J., and YELVERTON and SAUNDERS, JJ.

DOMENGEAUX, Chief Judge.

Murley and Don LeBlanc, husband and wife, filed this medical malpractice action on August 6, 1990, against Our

Lady of Lourdes Regional Medical Center and Drs. Luis Meza, George Smith, and Ronald Ritchey. Pursuant to La. R.S. 40:1299.47B(2)(a), all of the defendants raised an exception of prescription in district court, and three defendants, Lourdes, Smith, and Ritchey, were dismissed from the suit after the trial court granted their exception. Plaintiffs appeal that judgment and we, albeit reluctantly, affirm. The claim against Dr. Meza is not before us and will not be addressed in this opinion.

FACTUAL ALLEGATIONS

Plaintiffs allege that Murley LeBlanc was hospitalized at Lourdes in March of 1985 and was treated by Drs. Ritchey and Smith. On March 5, she underwent surgery for colon cancer, which surgery necessitated a blood transfusion.

Subsequent to her surgery, and for the next five years until the filing of this suit, Mrs. LeBlanc was treated by Dr. Meza, an oncologist.

In August of 1989, Mrs. LeBlanc submitted to a blood test required for the purchase of life insurance. The test revealed that she was infected with the human immunodeficiency virus (HIV), the virus believed to cause AIDS. Mrs. LeBlanc contends she was infected with HIV at the time of her 1985 surgery and blood transfusion.

The defendants contend that Lourdes did not and could not have tested its blood supply for HIV until at least March 20, 1985, when it received a newly released test for detecting HIV in blood samples. Mrs. LeBlanc's surgery was on March 5. Subsequent to Mrs. LeBlanc's

discovery of HIV infection in 1989, Lourdes was able to confirm that one of the donors of the blood used during her surgery is currently infected with HIV.

CLAIMS ASSERTED

The plaintiffs' petition is prescribed on its face based on the provisions of La. R.S. 9:5628. However, the LeBlancs contend that the prescriptive period in § 5628 is inapplicable or has been interrupted and that their claims against all defendants were asserted timely.

The LeBlancs' primary claim against the hospital is one of strict liability; they contend that the hospital is liable as the distributor of defective blood, not merely as a provider of patient care. Hence, they argue the prescriptive periods of one and three years contained

in La. R.S. 9:5628A are not applicable and cannot operate to bar their suit against the hospital. In support of their claim against Lourdes, the LeBlancs argue that in 1985, according to then current legislation, the distribution of blood was neither a medical service nor a part of patient care for purposes of the Medical Malpractice Act; accordingly, the pertinent prescriptive period is one year from the date they discovered their damage in August of 1989.

The LeBlancs' additional claim against the hospital, and their claims against Drs. Ritchey and Smith, are based on the patient care provided by those defendants. First, the LeBlancs suggest that Lourdes, Ritchey, and Smith failed to inform them that Mrs. LeBlanc received a transfusion and that as a result she

should be tested for HIV within three years (presumably so that she could file suit against them timely). Second, they argue the failure to inform constitutes the violation of a continuing duty, and when such tortious conduct continues, prescription does not begin to run until the wrongful conduct ceases.

Finally, the LeBlancs contend that if the prescriptive period articulated in the La. R.S. 9:5628 has not been interrupted or found to be inapplicable, then the statute itself is unconstitutional as it applies to HIV infected persons.

Pursuant to La. R.S. 9:2797, we reject the plaintiffs' strict liability claim against Lourdes. We decline to take up the plaintiffs' suggestion that we carve an exception out of § 2797 for

the "distribution" of defective blood. Additionally, we find no support in the record for the plaintiffs' suggestion that the defendants had a continuing duty to inform Mrs. LeBlanc that she had a transfusion and should therefore be tested for HIV. Furthermore, the record does not support the conclusion that the defendants acted to prevent the plaintiffs from availing themselves of their cause of action.

CONTRA NON VALENTAM AND CONSTITUTIONALITY OF § 5628

The LeBlancs' constitutional argument is based on the jurisprudential rule of contra non valentam which essentially provides that prescription does not run against a party unable to act. However, as the trial court noted, the general rule in Louisiana is that contra non valentam does not apply in

medical malpractice actions. See Chaney v. State, Department of Health and Human Resources, 432 So.2d 256 (La. 1983); Crier v. Whitecloud, 496 So.2d 305 (La. 1986); Rajnowski v. State Patrick's Hospital, 564 So.2d 671 (La. 1990), all cited by the trial judge in his reasons for ruling. These cases have held that the provisions of La. R.S. 9:5628 override this jurisprudentially created exception to prescription. Essentially, by its terms, § 5628 is peremptive.

In this action, the plaintiffs have called into question the constitutionality of § 5628, as it has been interpreted as a peremptory statute which overrides the equitable doctrine of contra non valentam. The State's attorney general was joined in the suit as an indispensable party, pursuant to

La. R.S. 49:257(B) and La. C.C.P. Art. 1880, and filed an answer asserting the constitutionality of § 5628. The trial court conducted an evidentiary hearing and considered the constitutionality issue. Both sides thoroughly briefed the issue for the trial court's benefit.

The defendants' argument in favor of upholding the statute's constitutionality is based on a long line of Louisiana cases which have considered and rejected constitutional attacks. The LeBlancs' argument against upholding the constitutionality of the statute is premised on the equal protection and adequate remedy provisions of the Louisiana Constitution. They argue first, that because Mrs. LeBlanc belongs to a class of individuals who, statistically, will not develop AIDS

within three years of infection with HIV, her right to equal protection has been violated. The class to which Mrs. LeBlanc belongs is defined by age and physical condition, two factors which cannot be used to discriminate. Second, the LeBlancs argue that the statute denies an adequate remedy to the 92% of HIV infected persons who do not develop AIDS within three years of infection.

The trial court considered the LeBlancs' arguments and supporting statistical and expert testimony and rejected their constitutional attack. The trial judge relied instead on the jurisprudence which has consistently upheld the statute's constitutionality. In the Crier case, for instance, the Supreme Court was presented with an attack on the constitutionality of § 5628

based on alleged violations of the adequate remedy and equal protection provisions of our state constitution. The court rejected these arguments and found that the Louisiana Constitution does not guarantee an adequate remedy "for every single injury." Further, since the Crier plaintiff offered no evidence to show that the statute does not further an appropriate state interest, it is presumed to be constitutional under the federal and state equal protection provisions. We, too, feel constrained to follow this jurisprudence; however, we point out several recent developments which indicate § 5628 may indeed be held unconstitutional in the near future by our Supreme Court.

RECENT DEVELOPMENTS

In 1990 and 1993, the Supreme Court suggested that the doctrine of contra non valentam may apply in medical malpractice cases where the health care provider himself has done some act which prevents the victim from availing himself of his cause of action for medical malpractice. See Rajnowski, supra, and Taylor v. Giddens, _____ So.2d _____, (La. 1993) (decided May 24, 1993). However, both of those cases reiterated that the so-called "discovery rule" of contra non valentam does not apply in medical malpractice actions. See Taylor, p. 10 of slip opinion. The discovery rule states that prescription does not run when the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. See Rajnowski and Whitnell v.

Menville, 540 So.2d 304 (La. 1989).

In 1992, in the cases of Whitnell v. Silverman, 598 So.2d 345 (La. 1992) and Reed v. St. Charles General Hospital, 602 So.2d 784 (La. App. 4th Cir. 1992), the courts remanded to the trial courts with exact instructions to determine the constitutionality of § 5628. In Whitnell, the Supreme Court specifically noted that the defendant doctor had done nothing to prevent the plaintiff from availing herself of her claim. Therefore, the Court implied that the "discovery rule" was to be considered in the evidentiary hearing on constitutionality. As of this writing, the hearing has been completed and the trial judge has taken the matter under advisement.

Also in 1992, the Second Circuit

decided the case of Branch v. Willis-Knighton Medical Center, 607 So.2d 883 (La. App. 2d Cir. 1992), a case which involved a blood transfusion in 1976 and the discovery of hepatitis in 1989. The Second Circuit reversed the trial court and upheld the defendant's peremptory exception of prescription, effectively barring the plaintiff's claim. On January 29, 1993, the Supreme Court granted a writ in this case and a decision has not yet been rendered. See Branch v. Willis-Knighton Medical Center, 612 So.2d 43 (La. 1993).

The Supreme Court denied writs on May 7, 1993 in the First Circuit case of Winder v. Avet, 613 So. 2d 199 (La. App. 1st Cir. 1992), a case which allowed a plaintiff to bring a suit on October 14, 1988, for alleged malpractice which

occurred in 1982. The First Circuit, in a three to two decision, based its opinion on the continuing tort theory, and not on the unconstitutionality of § 5628. However, the two dissenters cited the prescription statute as controlling and noted that the doctrine of contra non valentam has been held inapplicable in medical malpractice cases.

Based on this jurisprudence, we believe that a Supreme Court ruling on the issue of the constitutionality of § 5628 is imminent. We will await a decision, and we decline in this instance to declare the statute unconstitutional based on the statistical evidence presented by the LeBlancs. While it may be true that the statute operates to discriminate against Mrs. LeBlanc and members of her class, we cannot say that

this discrimination overrides the State's interest in limiting the time period for bringing medical malpractice actions. Nor can we say that this legislative restriction on a plaintiff's cause of action is violative of the adequate remedy provision of the constitution.

CONCLUSION

In reviewing this case, we have addressed the limited constitutional question of whether the "discovery rule" of the contra non valentam doctrine is applicable in this medical malpractice case. The Louisiana Supreme Court has already upheld the constitutionality of the medical malpractice prescription statute, § 5628. See Crier, supra. The Supreme Court has also consistently declined to apply the "discovery rule" to medical malpractice cases, most recently

in Taylor, supra, decided only a few weeks ago. While it is possible that the Supreme Court may reconsider these questions, see Whitnell, supra, and Branch, supra, it is not within our province to second guess our higher court in the face of long-standing jurisprudence and clearly articulated legislative will.

For the foregoing reasons, the judgment of the trial court is affirmed at plaintiffs' cost.

AFFIRMED.

JUN 16 1993

NO. 92-1040

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

IN RE: MURLEY HERNANDEZ LEBLANC AND DON L. LEBLANC
Plaintiffs - Appellants

vs.

LUIS MEZA, M.D., GEORGE SMITH, M.D., RONALD RITCHEY, M.D., OUR LADY OF LOURDES REGIONAL MEDICAL CENTER: RICHARD P. IEYOUB, ATTORNEY GENERAL OF THE STATE OF LOUISIANA
Defendants - Appellees

SAUNDERS, J., Dissenting.

I respectfully dissent. I cannot agree with the majority's position that an action in medical malpractice filed after the three year period has ended, and based upon a complaint with essentially alleges that plaintiffs did not know or with reason could not have known of the face of injury until after the expiration of such period, is barred

by LSA-R.S. 9:5628. I consider that the application of this statute, under the circumstances presented here, offends the access to courts provision of the Louisiana Constitution.

Article 1, Sec. 22, of the Louisiana Constitution states:

> All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

Such provision has no counterpart in the federal constitution. However, this provision, like the Fourteenth amendment to the United States Constitution,

protects fundamental interest to a greater extent than interests that are not considered of fundamental constitutional importance. See ***Everett v. Goldman,*** 359 So.2d 1256 (La. 1978). LSA-R.S. 9:5628 was enacted in the 1975 legislative session by 1975 La. Acts No. 808, § 1. It was one of several statutes passed in response to sharp increases in medical malpractice insurance rates and the resulting threat of reduced health care to the patient and of greatly increased medical costs to the public. Limitations on the time within which an injured patient may bring a malpractice action serves to restrict the number of suits brought, in turn reducing the amount of medical malpractice insurance rates.

The Louisiana Supreme Court has held

the statute to be prescriptive, and then held that the contra non valentam type exception to prescription embodied in the discovery rule is expressly made inapplicable after three years from the act, omission or neglect. See ***Hebert v. Doctors Memorial Hospital,*** 486 So.2d 717 (La. 1986), and ***Crier v. Whitecloud,*** on rehearing, 496 So.2d 305 (La. 1986). The discovery rule states that a claimant's cause of action does not accrue until the claimant discovered, or through the exercise of reasonable diligence should have discovered, the injury caused by the defendant's negligence. With all due respect to the Supreme Court, it is manifestly unrealistic and unfair to bar a negligently injured party's cause of action before he has an opportunity to discover that is exists. Furthermore, in

my judgment, the decision to prohibit the application of the discovery rule found in the contra non valentam doctrine has the effect of barring a right of redress or cause of action before it accrues against health care providers and other defendants. Notwithstanding the admittedly strong public policy surrounding the enactment of the statute and the interpretive jurisprudence, it is difficult for me to understand how a statute which extinguishes a right of action prior to the accrual of such action cannot be repugnant to the right of access to the courts guaranteed by Article 1, Sec. 22, of the Constitution of the State of Louisiana. In my judgment, the LeBlancs had a cause of action that is a vested property right. Malpractice claims have long been

recognized in this state. A cause of action for malpractice was vested and existed the moment the first drop of tainted blood entered the plaintiff's body. The distinction is that is had not accrued prior to the lapse of a three year period. The statute does not operate as a bar to a cause of action before it existed, but operates to limit the cause of action. Therefore, the LeBlancs had a cause of action that was a vested property right, contrary, in my opinion, to the conclusion reached in ***Crier, supra,*** at 310, that the patient, Mrs. Crier's, "vested property right" did not exist and, therefore, she could obtain no relief from Art. 1, Sec 22. Accordingly, the ***Crier*** Case is distinguishable from the action before us.

The constitutional right as stated in Article 1, Sec. 22, is to "an adequate remedy." Certainly this requires that an effective and reasonable alternative remedy be provided by due course of law for vindication of an injured person's constitutional interests, and that the remedy be substantially equal in value to the remedy abrogated by affording essentially comparable substantive protection to one's person, property, or reputation, although the form of the substituted remedy may be different. For instance, worker's compensation benefits are recognized as a substitute remedy for a civil action for damages against the employer. I also note the discussion found in Chief Justice Dixon's dissent in ***Williams v. Kushner,*** 549 So.2d 294, 309 (La. 1989). In that dissent, Justice

Dixon, after analyzing the legacy of the constitutional provision concluded, "only Louisiana's specifically guarantees an 'adequate' remedy, it can only be concluded that the addition of this qualifier was intended to protect the measure of relief to be found in our laws." No such remedy has been provided to the LeBlancs.

I do observe that under Article I, Sec. 22, of the Louisiana Constitution, the legislature is empowered to take action regarding the rights and remedies that are to be applied by the judiciary, including fixing statutes of limitations. ***Crier, supra.*** However, I do not find that a showing has been made that an appropriate state interest exists which supports a judicial determination of constitutionality, when a plaintiff

neither knows, nor with the exercise of due diligence was able to know of the existence of the injury giving rise to the cause of action. In ***Graley v. Stayatham,*** 74 O.O.2d 316, 320; 343 N.E.2d 832, 837-838 (Ohio 1976), the Court made the following observation with regard to a malpractice statute which is the counterpart to our Malpractice Act found in LSA-R.S. 40:1299.41, et seq., which I find applicable to our LSA-R.S. 9:5628:

> "Additionally, assuming a valid legislative purpose to enact laws relating to protection of the public's health, this legislation may be counter-productive. The extending of special litigation benefits to the medical profession certainly cannot be considered

as relating to protection of the public health. On the contrary, the quality of health care may actually decline. To the extent that in tort actions of the MALPRACTICE type if the medical profession is less accountable than formerly, relaxation of medical standards may occur with the public the victim."

I am, therefore, of the opinion that, as applied to the facts of this case, alleging the inability of the plaintiffs to be aware of the existence of an injury until after the expiration of the three year period, the abolition of the discovery rule is an onerous means of achieving the legislative goal of reducing malpractice lawsuits. I am also

of the opinion that to prohibit the application of the discovery rule is an unreasonable construction of the statute.

For the foregoing reasons, I respectfully dissent.

FIFTEENTH JUDICIAL DISTRICT COURT

PARISH OF LAFAYETTE

STATE OF LOUISIANA

IN RE: MURLEY HERNANDEZ LEBLANC, ET UX

DOCKET NO. 90-5317-A

RULING

This matter is before this Court on a peremptory exception of prescription filed on behalf of defendant, Our Lady of Lourdes Regional Medical Center.

Plaintiff, Murley H. LeBlanc, was a patient at Our Lady of Lourdes Regional Medical Center in March, 1985 and at this time underwent surgery on March 5, 1985. As a result of this hospitalization, plaintiff received transfusions of human blood and/or blood products and as a consequence of the transfusion, plaintiff is alleging that she became infected with

the HIV virus. Plaintiff also alleges that she had no knowledge of said infection until on or about August 22, 1989 when New York Life Insurance Company send her the results of a test performed as part of a routine life insurance application. Plaintiff's petition in this matter was filed on or about August 3, 1990.

The time for filing medical malpractice actions is set forth in La. R.S. 9:5628. The statute provides in pertinent part:

. . .

"A. No action for damages for injury or death against a physician ... whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year of the alleged act,

omission or neglect; however even as to claims filed within one year of the date of such discovery, **in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission or neglect. (Emphasis added).**

Under this statute, the allowable period for filing suit on a claim is one year from the date of the negligent act or one year from the date the plaintiff discovered the negligent act, but "in all events, at the latest" 3 years from the negligent act. As the alleged negligent act, i.e. the blood transfusion, occurred in 1985 and suit was not filed until 1990, this claim is prescribed on the face of the petition. Prescription runs regardless of the knowledge or lack of knowledge on the part of claimant. [See

Chaney v. State Dept. of Health & Human Resources, 432 So.2d 256 (La. 1983); Crier v. Whitecloud, 496 So.2d 305 (La. 1986); Rajnowski v. St. Patrick's Hospital, 564 So.2d 671 (La. 1990).] These Supreme Court cases, in applying La. R.S. 9:5628, state that the general rule is that plaintiff has one year to file suit from the discovery of his cause of action, restricting the time by providing that, regardless of the date of discovery, a claim must be filed at the latest within three years of the alleged act. Consequently, the statute provides notice that malpractice claims will be barred if not filed within the specified time limits. The statute is merely a legislative determination that three years is a reasonable period of time in which to assert a medical malpractice

claim.

Accordingly, for the reasons stated above, and expressions of our Supreme Court in the cases cited supra, the Court feels compelled to, and reluctantly does, rule that plaintiff's cause of action has prescribed under La. R.S. 9:5628.

Therefore, defendant's peremptory exception of prescription is hereby sustained.

Costs to be borne by plaintiff.

A Judgment conforming to this Ruling will be signed upon presentation.

THUS DONE AND SIGNED in Chambers at Crowley, Acadia Parish, Louisiana this 13th day of June, 1991.

_____

G. BRADFORD WARE, DISTRICT JUDGE

Copy to:

Oscar W. Boswell II

Marc W. Judice

FIFTEENTH JUDICIAL DISTRICT COURT

PARISH OF LAFAYETTE

STATE OF LOUISIANA

IN RE:

MURLEY HERNANDEZ LEBLANC, ET UX

DOCKET NO. 90-5317-A

AMENDED RULING

On June 13, 1991, the Court issued its ruling in the above captioned matter, finding that the plaintiff's causes of action had prescribed for any and all medical care or treatment provided by defendant, Our Lady of Lourdes. Through omission, the ruling was silent as to Drs. Ronald J. Ritchey, George R. Smith and Luis Meza. The Court hereby amends its previous ruling as follows:

"This matter is before this Court on a peremptory exception of prescription

filed on behalf of defendant, Our Lady of Lourdes Hospital, and Dr. Luis Meza, Dr. George Smith and Dr. Ronald J. Ritchey."

However, all other aspects of the original ruling shall remain the same, EXCEPT for the "continuous duty" claim alleged on behalf of Dr. Luis Meza. This claim was filed in October of 1990 and the alleged conduct of Dr. Meza extended from 1985, immediately after the surgery, until August 1989. Therefore, the question of prescription is raised due to the continuing treatment, coupled with a duty allegedly owed by Dr. Meza. Additionally, where the cause of the injury is a continuous one giving rise to damages, prescription dates from cessation of the wrongful conduct causing the damage. In this case, the alleged and continuous conduct of Dr. Meza

continued from 1985 until 1989, and as a routine part of Mrs. LeBlanc's treatment, Dr. Meza had blood tests performed on a regular basis, thereby giving rise to such a "continuous duty".

For the foregoing reasons, this Court maintains the exception of prescription on behalf of Our Lady of Lourdes, Dr. Ronald Ritchey and Dr. George Smith. However, the exception of prescription as to Dr. Luis Meza is hereby denied.

A Judgment conforming with this Ruling, as amended, will be signed upon presentation.

THUS DONE AND SIGNED in Chambers at Crowley, Acadia Parish, Louisiana, this 22nd day of July 1991.

G. BRADFORD WARE, District Judge

Copy to:

Oscar W. Boswell II

Marc W. Judice

FIFTEENTH JUDICIAL DISTRICT COURT

PARISH OF LAFAYETTE

STATE OF LOUISIANA

IN RE:

MURLEY HERNANDEZ LEBLANC, ET UX

DOCKET NO. 90-5317-A

SUPPLEMENTAL RULING

This supplemental ruling is being filed of record in the event that the previous ruling signed on June 13, 1991 was unclear as to the constitutionality of LSA-R.S. 9:5628.

After thorough review of the record and of the jurisprudence concerning this issue, this Court finds that the aforementioned statute is constitutional. [See Chaney v. State Dept. of Health & Human Resources, 432 So. 2d 256 (La. 1983); Crier v. Whitecloud, 496 So.2d 305

(La. 1986).]

A Judgment conforming with the Ruling will be signed upon presentation.

THUS DONE AND SIGNED in Chambers at Crowley, Acadia Parish, Louisiana, this 24th day of April, 1992.

G. BRADFORD WARE, District Judge

Copy to:
Oscar W. Boswell II
Norman W. Ershler
Marc W. Judice
Peter T. Dazzio

MURLEY H. LEBLANC

VERSUS

OUR LADY OF LOURDES REGIONAL MEDICAL CENTER, ET AL

15TH JUDICIAL DISTRICT COURT

PARISH OF LAFAYETTE

STATE OF LOUISIANA

DOCKET NUMBER 90-5317-A

****

JUDGMENT

For the reasons stated in Written Reasons, Amended Ruling and Supplemental Ruling issued by this court on 13 June 1991, 22 July 1991 and 24 April 1992;

IT IS ORDERED, ADJUDGED AND DECREED that the causes of action filed by Murley H. LeBlanc and Don L. LeBlanc in this proceeding and in the petition filed with the Louisiana Patient's Compensation Fund against Ronald J. Ritchey, M.D., George R. Smith, M.D., and Our Lady of Lourdes

Regional Medical Center, Inc. are declared prescribed as to Murley H. LeBlanc and Don L. LeBlanc under LSA-RS 9:5628 for any and all medical care or treatment provided by George R. Smith, M.D., Ronald J. Ritchey, M.D., and Our Lady of Lourdes Regional Medical Center, Inc. to Murley H. LeBlanc in 1985 and 1986 and are hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the exception of prescription filed on behalf of Dr. Luis Meza is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that LSA-RS 9:5628 is constitutional.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of these proceedings are to be: shared equally between plaintiffs and defendant Meza.

JUDGMENT SIGNED this 15th day of May, 1992.

HON. G. BRADFORD WARE
DISTRICT JUDGE

JUNEAU, JUDICE, HILL & ADLEY
(A PROFESSIONAL LAW CORPORATION)

MARC W. JUDICE
P. O. Drawer 51769
Lafayette, Louisiana 70505
318/235-2405

FILED THIS 18
DAY OF May 1992

DY. CLERK OF COURT

MURLEY HERNANDEZ LEBLANC

VERSUS

OUR LADY OF LOURDES
REGIONAL MEDICAL CENTER, INC.

DOCKET NUMBER

15TH JUDICIAL DISTRICT COURT

LAFAYETTE PARISH, LOUISIANA

PETITION

The petition of Murley Hernandez LeBlanc, a resident of the full age of majority of Acadia Parish, respectfully represents:

1.

Our Lady of Lourdes Regional Medical Center, Inc., a Louisiana nonprofit corporation, is joined as a defendant herein.

2.

At all times, material hereto, the defendant owned and operated the medical facility known as Our Lady of Lourdes

Regional Medical Center in Lafayette, Louisiana, which was a health care provider enrolled under La. R.S. 40:1299.41 et seq.

3.

Murley Hernandez LeBlanc was a patient at Our Lady of Lourdes Regional Medical Center from March 3 to March 14, 1985, and again from April 16 to April 24, 1985.

4.

During her two periods of hospitalization in Our Lady of Lourdes Regional Medical Center in 1985, Murley Hernandez LeBlanc received transfusions of human blood and/or blood products.

5.

The blood received by Murley Hernandez LeBlanc was obtained, processed and distributed by Our Lady of Lourdes

Regional Medical Center.

6.

As a consequence of the transfusions performed at Our Lady of Lourdes Regional Medical Center, Murley Hernandez LeBlanc became infected with the HIV virus.

7.

Murley Hernandez LeBlanc remained asymptomatic for infection with the HIV virus, and had no knowledge of that infection until on or about August 22, 1989, when she was furnished with the results of a blood test performed for New York Life Insurance Company in the course of a routine examination in connection with the purchase of an insurance policy.

8.

As a consequence of the infection, Murley Hernandez LeBlanc has suffered and will suffer great mental anguish and

physical pain and suffering, and loss of quality of life and life expectancy, and has incurred and will incur medical expenses, and is entitled to recover for the same from the defendant.

9.

At the time of the transfusion of human blood and/or blood components to Murley Hernandez LeBlanc, the presence of the HIV virus in human blood was detectable by appropriate medical and scientific laboratory tests.

10.

The provisions of LA R. S. 9:2797 and LA C.C. article 2322.1 are inapplicable to the present case, and the defendant is strictly liable to the plaintiffs.

11.

After the blood transfusion, the

defendant breached its continuing obligations and duties to the plaintiff by failing to monitor or to make surveys or inquiries of its prior blood donors, or otherwise determine their status with regard to HIV infection, and to inform the recipients of blood or blood products from those persons of the possibilities of infection, which resulted in Murley Hernandez LeBlanc not learning that she had been infected with HIV until August, 1989.

12.

La. R.S. 9:5628 is inapplicable to the present action, which is against the defendant in its capacity as a processor and supplier of human blood, for damages arising from the marketing of blood that created an unreasonable risk of harm to others, and is thus not a claim "arising

out of patient care".

13.

If it were applied to the facts of this case to bar recovery by the plaintiff, La. R.S. 9:5628 would violate the United States and Louisiana Constitutions, in the following non-exclusive particulars:

(1) La. R.S. 9:5628 deprives the plaintiff of "an adequate remedy by due process of law and justice" under Article 1 § 22 of the Louisiana Constitution of 1974. Because of the long incubation period of the HIV virus, application of the provisions of La. R.S. 9:5628 to victims of blood transfusion transmission of HIV, like the plaintiff, would amount to a totally arbitrary abolition of the right to

recover under Civil Code Article 2315 with regard to the victims of the HIV virus, which will scarcely (if ever) manifest itself within a short enough time frame to enable the exercise of a cause of action prior to its peremption by La. R.S. 9:5628, and would amount to an invidious discrimination against such victims, serving no valid state interest.

(2) La. R.S. 9:5628 violates equal protection clauses of both the federal and state constitutions.

(3) La. R.S. 9:5628 violates that portion of Article 1 § 3, of the Louisiana Constitution of 1974 providing that "no law shall arbitrarily, capriciously, or unreasonably discriminate against a

person because of birth, age, sex, culture, physical condition or political ideas or affiliations". It does so by discriminating between a person who is injured (or ultimately will suffer injury) from the HIV virus and one otherwise injured.

(4) The statute does not suitably further any appropriate state interest, in that there is no appropriate state interest in discriminating adversely against a person receiving (say) the HIV virus in a blood transfusion (which may not manifest symptoms for five years or more) and (say) a hepatitis infection (which may manifest itself in a month).

The Five Hundred Thousand Dollar ($500,000.00) limitation on recovery imposed by the La. R.S. 40:1299.42 is unconstitutional under the equal protection and due process clauses of both the federal and state constitutions, and under the "adequate remedy" clause (Article 1 § 3) of the Louisiana Constitution of 1974.

15.

Without limiting the foregoing claims of strict liability, the plaintiff alleges that the defendant was negligent and/or breached its duties to the plaintiff in connection with the aforementioned transfusions, in the following particulars:

(a) Failing adequately to screen the donors from whom human blood and/or blood products were obtained;

(b) Failing adequately to test the human blood and/or blood products;

(c) Failing to inform Murley Hernandez LeBlanc of the dangers of HIV infection and to obtain from her informed consent to the transfusions;

(d) Failing to have available, properly maintained and operable, proper equipment for selected-donor transfusions;

(e) Failing to advise Murley Hernandez LeBlanc of the advisability of autologous or selected-donor transfusions;

(f) Such other acts as may be discovered and proven at trial.

WHEREFORE, plaintiff prays for judgment against the defendant for such damages as are reasonable in the

premises, and for all costs of this proceeding, and for all general and equitable relief.

By her attorney,

OSCAR W. BOSWELL II
Attorney at Law
Louisiana Bar #3282
Post Office Box 3207
Lafayette, Louisiana 70502
(318) 237-4465

Please serve:

Our Lady of Lourdes Regional Medical Center, Inc.
Through its Registered Agent
Mr. Dudley Romero
611 St. Landry Street
Lafayette, Louisiana 70506

RECEIVED AUG 6 - 1990
DOUGLAS D. GREEN
COMMISSIONER OF INSURANCE

MURLEY HERNANDEZ LEBLANC, ET UX

VERSUS

RONALD J. RITCHEY, ET AL

DOCKET NUMBER

15TH JUDICIAL DISTRICT COURT

LAFAYETTE PARISH, LOUISIANA

PETITION

The Petition of Murley Hernandez LeBlanc, and of her husband Don L. LeBlanc, residents of Acadia Parish, Louisiana, respectfully represents:

1.

Ronald J. Ritchey and George R. Smith, both of whom are medical doctors and residents of Lafayette Parish, Louisiana, are joined as defendants herein.

2.

At all times material hereto, the

defendants practiced medicine in Lafayette Parish, Louisiana, and, on information and belief, were enrolled as qualified Health Care Providers under La. R.S. 40:1299.41 et seq.

3.

At all times material hereto, the plaintiffs were husband and wife.

4.

Murley Hernandez LeBlanc was a patient at Our Lady of Lourdes Regional Medical Center in Lafayette, Louisiana, from March 3 to March 14, 1985.

5.

During her period of hospitalization at Our Lady of Lourdes Regional Medical Center, Murley Hernandez LeBlanc received transfusions of human blood and/or blood products.

6.

As a consequence of the transfusions performed at Our Lady of Lourdes Regional Medical Center, Murley Hernandez LeBlanc became infected with the HIV virus.

7.

Murley Hernandez LeBlanc remained asymptomatic for infection with the HIV virus, and had no knowledge of that infection until on or about August 22, 1989, when she was furnished with the results of a blood test performed for New York Life Insurance Company in the course of a routine examination in connection with the purchase of an insurance policy.

8.

As a consequence of the infection, Murley Hernandez LeBlanc has suffered and will suffer great mental anguish and physical pain and suffering, and loss of quality of life and life expectancy, and

has incurred and will incur medical expenses.

9.

As a consequence of the infection of Murley Hernandez LeBlanc with the HIV virus, Don L. LeBlanc has suffered and will suffer great mental anguish, loss of consortium, and fear of infection with the HIV virus, and the consequences thereof, and is entitled to recover for the same from the defendants.

10.

At the time of her admission to Our Lady of Lourdes Regional Medical Center on March 3, 1985, Mrs. LeBlanc's attending physician was a defendant, Dr. Ronald J. Ritchey.

11.

On the advice of Dr. Ritchey, Dr. George R. Smith was consulted, and on

March 5, 1985, recommended that surgery (right colon resection) be performed immediately.

12.

Surgery was performed by Dr. Smith on or about March 5, 1985.

13.

During the course of the surgery, or in post-operative care, Mrs. LeBlanc received the blood and/or blood products that caused her infection with the HIV virus.

14.

In connection with the surgery mentioned above, and, specifically, with the transfusion of blood and blood products mentioned above, the defendants, George R. Smith and Ronald J. Ritchey, violated their duties to Murley Hernandez LeBlanc in the following non-exclusive

particulars:

(1) They failed to advise Murley Hernandez LeBlanc that she would receive a transfusion of human blood and/or blood products.

(2) They failed to advise Murley Hernandez LeBlanc of the risks and dangers associated with a transfusion of human blood and/or blood products, and specifically those relating to the transmission of the HIV virus.

(3) They failed to obtain from Murley Hernandez LeBlanc informed consent to a transfusion of human blood and/or blood products.

(4) They failed to advise Murley Hernandez LeBlanc of the possibility and desirability of obtaining donations from selected donors of

blood and/or blood products.

(5) They failed to test the human blood and/or blood products administered to Murley Hernandez LeBlanc, although appropriate scientific tests to detect the HIV virus in such products were available.

(6) They committed such other negligent acts of omission and commission as may be discovered and proven at trial.

15.

Subsequent to the transfusion of human blood and/or blood products mentioned above, the defendants George R. Smith and Ronald J. Ritchey violated their duties to Murley Hernandez LeBlanc in the following (non-exclusive) particulars:

(1) They failed to inform Murley

Hernandez LeBlanc that she had received a transfusion of human blood and/or blood products.

(2) They failed to advise Murley Hernandez LeBlanc to have tests performed to determine whether or not the transfusion of human blood and/or blood products had resulted in her infection with the HIV virus.

(3) They breached a continuing duty to Murley Hernandez LeBlanc to make certain that she was aware that (a) in March, 1985 she had received a transfusion of blood and/or blood products and (b) she should within three years of the date of her receipt of those blood products be tested for infection with HIV virus in order to preserve any rights of action that she might have against

the supplier of such blood and/or blood products.

16.

As a consequence of the failure of the defendants to furnish her with adequate information, Murley Hernandez LeBlanc was not aware that she had received human blood and/or blood products during her hospitalization in March, 1985, and did not learn of that transfusion until after August 22, 1989.

17.

If Murley Hernandez LeBlanc had known prior to surgery that she would receive or would be likely to receive human blood and/or blood products, upon the receipt of proper advice as to the risks of infection with HIV virus and other diseases, Murley Hernandez LeBlanc would have opted for donations from

selected donors, rather than the use of blood and/or blood products from the blood bank of Our Lady of Lourdes Regional Medical Center.

18.

Had Murley Hernandez LeBlanc been informed prior to March 5, 1988, that she had received human blood and/or blood products during her March, 1985 hospitalization, which products had not been tested for the HIV virus, Murley Hernandez LeBlanc would have obtained appropriate medical tests to determine whether or not she was infected with the HIV virus.

19.

If it were applied to the facts of this case to bar recovery by the plaintiff, La. R.S. 9:5628 would violate the United States and Louisiana

Constitutions, in the following non-exclusive particulars:

(1) La. R.S. 9:5628 deprives the plaintiff of "an adequate remedy by due process of law and justice" under Article 1 § 22 of the Louisiana Constitution of 1974. Because of the long incubation period of the HIV virus, application of the provisions of La. R.S. 9:5628 to victims of blood transfusion transmission of HIV, like the plaintiff, would amount to a totally arbitrary abolition of the right to recover under Civil Code Article 2315 with regard to the victims of the HIV virus, which will scarcely (if ever) manifest itself within a short enough time frame to enable the exercise of a cause of action

prior to its peremption by La. R.S. 9:5628, and would amount to an invidious discrimination agsint such victims, serving no valid state interest.

(2) La. R.S. 9:5628 violates equal protection clauses of both the federal and state constitutions.

(3) La. R.S. 9:5628 violates that portion of Article 1 § 3, of the Louisiana Constitution of 1974 providing that "no law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition or political ideas or affiliations". It does so by discrimination between a person who is injured (or ultimately will suffer injury) from

the HIV virus and one otherwise injured.

(4) The statute does not suitably further any appropriate state interest, in that there is no appropriate state interest in discriminating adversely between a person receiving (say) the HIV virus in a blood transfusion (which may not manifest symptoms for five years or more) and (say) a person receiving a hepatitis infection (which may manifest itself in a month).

20.

The Five Hundred Thousand Dollar ($500,000.00) limitation on recovery imposed by the La. R.S. 40:1299.42 is unconstitutional under the equal protection and due process clauses of

both the federal and state constitutions, and under the "adequate remedy" clause (Article 1 § 3) of the Louisiana Constitution of 1974.

WHEREFORE, plaintiffs pray for judgment against the defendants for such damages as are reasonable in the premises, and for all costs of this proceeding, and for all general and equitable relief.

By their attorney,

OSCAR W. BOSWELL II
Attorney at Law
Louisiana Bar #3282
Post Office Box 3207
Lafayette, Louisiana 70502
(318) 237-4465

IN RE: MURLEY HERNANDEZ
LEBLANC AND DON L. LEBLANC

VERSUS

LUIS MEZA, M.D., GEORGE
SMITH, M.D., RONALD RITCHEY,
M.D., OUR LADY OF LOURDES
REGIONAL MEDICAL CENTER, AND
RICHARD P. IEYOUB, ATTORNEY
GENERAL OF THE STATE OF
LOUISIANA

SUPREME COURT

STATE OF LOUISIANA

APPLICATION FOR CERTIORARI OR WRIT OF REVIEW BY MURLEY HERNANDEZ LEBLANC AND DON L. LEBLANC

Murley Hernandez LeBlanc and Don L. LeBlanc respectfully represent that they are the plaintiffs-appellants in this case and their Application for Certiorari or writ of review to the Court of Appeal, Third Circuit, in this matter is as follows:

* * *

Statement of Reasons for Granting Writ

* * *

(2) The Court of Appeal erroneously upheld the constitutionality of R.S. 9:5628, which is properly at issue in this case.

...

* * *

Assignment of Errors

* * *

(2) If applied in this case, R.S. 9:5628 is unconstitutional because (a) it violates equal protection requirements by distinguishing unreasonably between persons on the basis of physical condition and age and by denying equal protection of law; (b) it violates the "adequate remedy" provisions of the Louisiana Constitution;

and/or (c) it violates both federal and state due process under Mennonite standards by depriving the plaintiff of a vested property right without providing reasonable opportunity for notice of the impending loss.

* * *

ARGUMENT ON ASSIGNMENT OF ERRORS

* * *

Equal Protection

* * *

Applying 9:5628 to Mrs. LeBlanc's claim also violates the "equal protection of the laws" clause of the U.S. and Louisiana Constitutions. R.S. 9:5628 does not equally protect all recipients of HIV-tainted blood transfusions. Instead it distinguishes between them.

On one side - the favored side - it places those who exhibit symptoms within an unusually short period of time (as HIV infections go). On the other side, it places the vast majority of the victims of such infections, who will be deprived of their action because the "incubation period" for their age group is 4, or 5, or 7 or 12 years. No quid pro quo compensates for the discrimination.[34] We respectfully suggest that "such a result is intolerable ..." Taylor v. Giddens, La. Sup. Ct. No. 92-C-3054, slip opinion page 8.

A law mandating the dismissal of 92 percent of HIV blood transfusion claims (or 92 percent of all medical malpractice claims) chosen at random by lot might

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[34]Cf. Butler v. Flint Goodrich Hospital, 607 So. 2d 517, at 521 (La. 1992).

"further the state's objective" re medical care. It might be "rational" (in a sense) if only the objective (reduction of medical costs) were considered. But it would not be "rational" in the way that it distinguished between those who would recover and those who would not - it would be arbitrary, just like R.S. 9:5628. "[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even [the U.S. Supreme Court's] most deferential standard of review."[35]

* * *

Due Process

The state's destruction of a vested property right without reasonable notice of the existence of that right also

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[35]Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71, at 83, 108 S. Ct. 1645, at 1653, 100 L. Ed. 2d 62 (1988).

violates due process under both the U.S. and Louisiana Constitutions. "Even though the malpractice is not discovered, ... medical malpractice claims ... exist from the inception of the tortious act ..." Taylor v. Giddens, La. Sup. Ct. No. 92-C-3054, slip opinion at page 7 (emphasis added). "[A] cause of action in strict tort liability under Civil Code Article 2315 ... is a vested property right protected by the guarantee of due process." Faucheaux v. Alton Ochsner Medical Foundation Hospital, 470 So. 2d 878, at 878-79 (La. 1985). One with a legally protected property interest is entitled to reasonable notice of its impending loss. Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983); Magee v. Amiss, 502 So. 2d 568 (La. 1987).

R.S. 9:5628's three-year limit on the "discovery rule" operates to deprive persons of vested property rights in a cause of action without allowing them reasonable notice of that cause of action. Indeed, when applied to those with existing causes of action, the very purpose of 9:5628 is to prevent effective notice - to insure that in many cases notice comes too late to sue. When Crier upheld the constitutionality of 9:5628 it held that under the facts of that case the statute merely limited malpractice actions "to those situations where the injury occurs within three years"[45] and that the legislature had not eliminated the remedy for a civil wrong - it had merely made a "determination that after a certain period of time no cause of action

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[45]496 So. 2d at 309 (emphasis added).

can arise."[46] The Crier rationale, we respectfully represent, breaks down when applied to a case like Mrs. LeBlanc's in which the injury (though not knowledge of it) occurred at the same time as the act.

We respectfully suggest that the issue of the constitutionality of R.S. 9:5628 should be reviewed in light of the court's other jurisprudence. Depriving Mrs. LeBlanc of an opportunity for reasonable notice of the impending loss of her vested property right in her claim violates due process.

* * *

7. Conclusion

We respectfully suggest that the decision of the Court of Appeal is wrong, and request that it be reviewed and reversed.

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[46]496 So. 2d at 310 (emphasis added).

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No. 94-589

In The

Supreme Court of the United States

October Term, 1994

MURLEY HERNANDEZ LEBLANC, ET AL.,

Petitioners,

versus

LUIS MEZA, M.D., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

BRIEF OF RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

Respondents wish to clarify the scope of the constitutional issues raised in the courts below, a matter addressed at page 14 of Petitioners' Petition to this Court. Federal and State equal protection challenges were raised in Petitioners' pleadings in the trial Court, as arguably was a Federal *substantive* due process challenge.[1] However, the trial Court pleadings do not allege a Federal *procedural* due process violation, even by implication.

Petitioners presented *no* Federal constitutional arguments to the Court of Appeals. The opinion of that court notes that the constitutional issues presented were related to equal protection and adequate remedy provisions of the *state* Constitution.[2] The *Mennonite* procedural due process claim pressed before this Court was first explicitly stated in Petitioners' Application for Certiorari filed with the Louisiana Supreme Court.[3]

The Louisiana Supreme Court and the Courts of Appeal of that state ordinarily will not consider constitutional issues not first raised in the trial court or preserved in the lower appellate court. See, e.g., *State v. Madere*, 352

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[1] See Petition for Writ of Certiorari [hereinafter "Petition"], p. 80-82. The arbitrariness of the statute at issue was alleged, but the specific invocation of the Due Process Clause of the Federal Constitution was limited to Petitioners' challenge to the state's statutory limitation on damage awards and is absent from the alleged challenge to the limitations statute which is the subject of the instant Petition. [Compare Petition, p. 80-82 with Petition, p. 83].

[2] See Petition, p. 41-42.

[3] See Petition, p. 100-02.

So.2d 666, 669 (La. 1977). Likewise, this Court usually will not review constitutional issues not stated with particularity and passed upon by the state courts. *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 75-78, 108 S.Ct. 1645, 1649-50. Whether the prerequisites to review by this Court are fully met in the instant case is questionable at best.

ARGUMENT

Procedural Due Process

The Fourteenth Amendment protects against deprivation of property interests, but only where the deprivation is the result of state action. See *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 485-87, 108 S.Ct. 1340, 1345-46 (1988). When the state's role is limited to the enactment of a "self-executing" limitations period, the private use of that state-sanctioned remedy does not amount to state action sufficient to implicate the Due Process Clause. *Id.*; see also *Texaco, Inc. v. Short*, 454 U.S. 516, 536, 102 S.Ct. 781, 796 (1982).

The Louisiana statute challenged by Petitioners is exactly the type of "self-executing" statute of limitations which this Court repeatedly has held does not involve the kind of state action required for purposes of the Fourteenth Amendment. Accordingly, Petitioners' procedural due process arguments are without merit.

Equal Protection

Under equal protection analysis, the Louisiana statute is presumed to be constitutional, and it is Petitioners' burden to prove otherwise. *Bankers Life and Cas. Co. v. Crenshaw,* 486 U.S. 71, 81, 108 S.Ct. 1645, 1652 (1988). Furthermore, since this case does not involve a suspect class or impingement on a fundamental right, neither strict scrutiny nor intermediate scrutiny is appropriate. Cf. *Clark v. Jeter,* 486 U.S. 456, 108 S.Ct. 1910 (1988), cited by Petitioners. *Clark* involved an illegitimate and for that reason this Court applied intermediate scrutiny. 486 U.S. at 461-62, 108 S.Ct. at 1914. Where, as here, minimum scrutiny applies, the Equal Protection Clause is satisfied so long as the challenged legislative classification is rationally related to a plausible governmental policy and based on facts which rationally may have been considered true by the legislature. *Nordlinger v. Hahn,* 112 S.Ct. 2326, 2331-32 (1992).

The Louisiana Supreme Court has found that the statute challenged by Petitioners is rationally related to the state's legitimate interest in promoting the availability of health care at a reasonable cost. *Crier v. Whitecloud,* 496 So.2d 305, 309 (La. 1986). The statute was enacted as part of a comprehensive effort to reduce the rate at which malpractice premiums escalate. *Id.,* at 308-09. The cost of malpractice premiums is passed on by the health care provider to the consumer. There was also some concern that escalating premiums would force some providers out of Louisiana. *Id.* Actuarial uncertainty caused by possible "long tail" exposure for insurers was seen as a primary cause of increasing insurance costs. *Id.* The enactment of

a firm three-year limitation period was intended to alleviate this problem. *Id.*

The statute at issue is rationally related to a legitimate state interest. Accordingly, Petitioners' equal protection challenge is without merit.

CONCLUSION

To the extent that they have been properly preserved, Petitioners' due process and equal protection challenges are, under settled principles repeatedly enunciated by this Court, without merit. Accordingly, Respondents respectfully submit that there is no reason for this Court to grant certiorari in order to review them.

Respectfully submitted,

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